Gemencheh Granite Sdn Bhd v Puncabahan Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-1750–10 OF 2011
HASNAH MOHAMMED HASHIM J
18 SEPTEMBER 2012

Evidence — Expert evidence — Opinion based on reports — Conflicting opinion — Judicial appreciation of evidence — Assessing and weighing expert evidence — Test results different — Samples tested were retrieved from different sources — Plaintiff's samples tested from quarry — Defendants samples tested from affected stretch of road — Whether plaintiff's sampling complied with JKR specifications

Sale of Goods — Building materials — Defective materials — Allegation that materials supplied were defective — Whether established — Whether crusher runs supplied and delivered by plaintiff were not defective at time of delivery — Buyer's right to examine goods delivered — Sale of Goods Act 1957 ss 41 & 42

The first defendant had ordered crusher runs, premix and tack coat '(the said materials') from the plaintiff for the construction and upgrading a stretch at Kuala Pilah, Negeri Sembilan. At the request of defendants, the plaintiff supplied the said materials. Despite notices given for the materials supplied, the defendants had refused to pay the outstanding sum. Instead, the defendants alleged that the materials supplied were defective and did not meet the specification required by the Jabatan Kerja Raya ('JKR'). As a result, the finished works were found to be defective and failed to meet JKR's requirements. In its counterclaim, the defendants claimed for the cost of buying the crusher runs from a different supplier and the cost and expenses incurred to repair the affected road. The issue considered herein was whether the said materials supplied by the plaintiff were defective.

Held, allowing the plaintiff's claim with costs and dismissing the defendants' counterclaim with costs:

(1) Based on the oral and documentary evidence prior to the first defendant's agreement to purchase the crusher runs, two tests were conducted. The first test conducted on the samples provided failed to meet the specifications. However, a second test was duly conducted and then samples tested successfully met with the specifications of JKR. This was confirmed through the evidence of PW1, DW1, DW2, DW3 and DW4. The materials were then supplied and delivered to the project site (see para 20).

(2) The first defendant had examined the crusher run and it was only after the result of the second test, it found to be in compliance with JKR specifications, that the crusher runs were supplied and ultimately used by the first defendant in the road project. Applying ss 41 and 42 of the Sale of Goods Act 1957, the first defendant was deemed to have accepted the crusher runs and all other materials supplied when they were delivered to the project site and duly accepted by the first defendant (see para 26).

(3) The second defendant had signed the guarantee on behalf of the first defendant accepting the terms and conditions therein. Therefore, in the absence of fraud, the defendants were bound by the terms of the said guarantee (see para 44).

(4) The defendants had failed to establish that the crusher runs supplied by the plaintiff were defective. Therefore, the defendants could not succeed in its claim for the cost of purchasing the crusher runs from other suppliers. Furthermore, the defendants could not even verify the invoices for the supply of crusher runs from other suppliers (see para 45).

[Bahasa Malaysia summary

Defendan telah membuat pesanan untuk batu kecil, pracampuran dan lapisan bitumen ('barang-barang tersebut') daripada plaintif untuk pembinaan dan menaik taraf jalan di Kuala Pilah, Negeri Sembilan. Atas permintaan defendan-defendan, plaintif membekalkan barang-barang tersebut. Walaupun notis-notis diberi untuk barang-barang yang telah dibekalkan, defendan-defendan menolak daripada membayar bayaran tertunggak. Sebaliknya, defendan-defendan mendakwa bahawa barang-barang tersebut barang tidak elok dan tidak memenuhi spesifikasi yang dikehendakki oleh Jabatan Kerja Raya ('JKR'). Akibatnya, kerja-kerja siap didapati cacat dan gagal memenuhi kehendak JKR. Dalam tuntutan balasnya, defendan-defendan menuntut untuk kos pembelian batu kecil daripada pembekal lain dan kos dan pembelanjaan yang ditanggung untuk membaiki jalanraya yang terjejas tersebut. Isu yang dipertimbangkan di sini adalah sama ada barang-barang tersebut yang dibekalkan oleh plaintif adalah tidak elok.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan-defendan dengan kos:

(1) Berdasarkan keterangan lisan dan dokumentari sebelum perjanjian defendan pertama untuk membeli batu kecil, dua ujian telah dilakukan. Ujian pertama yang dilakukan ke atas sampel yang disediakan gagal untuk memenuhi spesifikasi tersebut. Walau bagaimanapun, ujian kedua dilakukan dengan sewajarnya kemudiannya sampel-sampel yang diujikan berjaya memenuhi spesfikasi JKR. Ini disahkan melalui keterangan PW1, DW1, DW2, DW3 dan DW4. Barang-barang tersebut kemudiannya dibekalkan dan dihantar ke kawasan projek (lihat perenggan 20).

(2) Defendan pertama memeriksa batu kecil tersebut dan hanya selepas keputusan ujian kedua, ia didapati memenuhi spesifikasi JKR, bahawa batu kecil dibekalkan dan akhirnya digunakan oleh defendan pertama dalam projek jalanraya tersebut. Mengguna pakai ss 41 dan 42 Akta Jualan Barangan 1957, defendan pertama dianggap menerima batu kecil tersebut dan kesemua barang lain yang dibekalkan apabila ia dihantar ke kawasan projek dan diterima oleh defendan pertama (lihat perenggan 26).

(3) Defendan kedua telah menandatangani dan menjamin bagi pihak defendan pertama menerima terma-terma dan syarat-syarat di dalamnya. Oleh itu, dalam ketiadaan fraud, defendan-defendan terikat dengan terma-terma jaminan tersebut (lihat perenggan 41).

(4) Defendan-defendan telah gagal untuk membuktikan bahawa batu kecil yang dibekalkan oleh plaintif tidak elok. Oleh itu, defendan-defendan tidak berjaya dalam tuntutannya untuk kos pembelian batu kecil tersebut daripada pembekal lain. Selanjutnya, defendan-defendan juga tidak dapat mengesahkan invois untuk pembekalan batu kecil tersebut daripada pembekal (lihat perenggan 45).]

Notes

For a case on opinion based on reports, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 1753.

Cases referred to

Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1; [2011] 1 LNS 232, CA (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Leaf v International Galleries [1950] 1 All ER 693, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Sim Ah Oh v PP [1962] 1 MLJ 42; [1961] 1 LNS 124 (refd)

Sim Ah Song & Anor v Rex [1951] 1 MLJ 150; [1951] 1 LNS 83 (refd)

Universal Cable (M) Bhd v Bakti Arena Sdn Bhd & Ors [2000] MLJU 106; [2000] 3 CLJ 375, HC (refd)

Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2010] 3 MLJ 425; [2010] 4 CLJ 203, CA (refd)

Legislation referred to

Sale of Goods Act 1957 ss 41, 42

Murali Achan (K Kulasekar Achan & Associate) for the plaintiff/respondent.

Tan Foong Luen (Lee Kai Yet with him) (Tan, Goh & Associate) for the defendant/appellant.

Hasnah Mohammed Hashim J:

BRIEF BACKGROUND

[1] The plaintiff operates a quarry and supplies construction materials such as premix, crusher run and tack coat. The first defendant is contractor and a customer of the plaintiff. The first defendant had ordered crusher run, premix and tack coat from the plaintiff for the construction and upgrading a stretch of at Jalan Bahau-Jelai-Dangi, Kuala Pilah, Negeri Sembilan. The first defendant executed a continuing credit dated 27 May 2009 (pp 1–4 A) in favour of the plaintiff. The credit level under the continuing credit was RM500,000 and the terms of payment was 45 days.

[2] By a letter dated 24 March 2010 the credit facilities were revised. The revised credit limit was increased to RM1.5m with a condition that advance upfront cash was to be provided together with a signed open dated cheque from the first defendant. At the request of the defendants the plaintiff supplied premix, crusher run and tack coat ('the said materials'). The total cost of materials supplied amounted to RM982,923.88. The said materials were duly supplied and delivered to the defendants.

[3] Despite notices given for the materials supplied the defendants refused to pay the outstanding sum RM512,557.81. According to the defendant the materials supplied were defective and did not meet the specification required by the Jabatan Kerja Raya ('JKR'). As a result the finished works were found to be defective and failed to meet JKR's requirements. Thereupon the first defendant cancelled the cheque of RM500,000 that was given as payment to the plaintiff.

EVALUATION OF EVIDENCE

PW1

[4] Tai Sin Yong is the senior marketing manager of the plaintiff and has dealt extensively with the first defendant. PW1 in his witness statement states that the plaintiff had responded to the first defendant's letter dated 8 July 2010 cancelling the cheque and also notifying that the first defendant were conducting all test and analysis of the materials supplied. In the event the test shows that the quality of the materials supplied are in accordance with JKR's specification the monies will be released to the plaintiff. By a letter dated 20 July 2010 the plaintiff had suggested that a joint sampling be conducted and

the samples be sent to an accredited laboratory mutually agreed by the parties such as UTM, Kolej Universiti Teknologi Tun Hussein Onn ('KUITTHO'), IKRAM. PW1 confirmed that the crusher run and premix were taken from the project site and sent to KUITTHO for testing. The result of the tests show that the crusher run premix complied with JKR's specification (pp 18–25 A). However the test conducted by KUITTHO and Geolab Sdn Bhd bear different results thereby prompting the consultant of the project to direct further testing to be conducted.

[5] According to PW1 samples were taken from the road. However he is of the view that it was not proper to determine the quality of the crusher run by taking samples from the road as the crusher will become finer. The samples were then sent to IKRAM for testing. In addition the plaintiff had also sent samples to Master Soil Laboratory. The IKRAM test results show that the quality of the crusher run was not in accordance with the JKR specifications. The plaintiff then informed the defendants by a letter dated 14 April 2011 and 19 July 2011 requesting for another testing and the samples sent to KUITTHO, UTM, UKM and Testech Sdn Bhd. This however was not done as the defendants had replaced 90% of the crusher run.

[6] PW1 further states in his witness statement that the plaintiff had supplied a total of 31,000 tonnes of crusher runs. 90% would be 27,990 of crusher runs. According to PW1:

> It is highly incredible that the first defendant would excavate 27,900 tons of crusher and replaced it. To transport 27,900 tons the first defendant would require more than 1,000 lorries, each carrying an average of 25 tons, to transport that quantity of crusher run. Secondly the first defendant did not inform the plaintiff that it was going to replace the crusher run.

PW2

[7] PW2, Yap Seow Keong, is the technical manager of Testech Sdn Bhd who conducted the test on the samples if crusher run to determine if it complied with the JKR specifications. The test was conducted sometime in April 2011. Tests were firstly conducted to determine the density and the moisture content. The test was conducted to establish the maximum dry density and optimum moisture content of the sample.

[8] After the test to determine the moisture content was conducted another test known as California Bearing Ratio ('CBR') test was conducted. PW2 explained in his witness statement that CBR:

A … is a penetration test for evaluation of the mechanical strength of crusher run. This test is necessary for the purpose of determining the design of the premix that is used in road construction.

B **[9]** JKR's specification for the CBR value should be more than 80%. According to PW2 the crusher complied with the JKR specification.

DW1

C **[10]** DW1, Dato' Aznan Abu Bakar is the managing director of the first defendant. He was involved in the negotiation of the supply of the crusher run, premix and tack coat from the plaintiff and had negotiated with PW1.

[11] He confirmed in his witness statement that prior to the awarding of the supply contract the crusher run of the plaintiff was sent for testing:

D Yes it is the requirement by JKR that these Products are to be tested and certified to meet the specifications of JKR. As such, a sample of the crusher run was collected by the consultant, Perunding Setia SAR form the quarry stock pile, witnessed by the representatives of Pucabahan Sdn Bhd and the plaintiff.

E **[12]** The samples were sent to Geolab (Seremban) Sdn Bhd for testing and the result of the test shows that it did not comply with JKR specifications and the consultant requested that further test be conducted on another sample. A second test was conducted and it complied with the JKR's specifications. The
F defendant then proceeded with the supply contract with the plaintiff and a continuing guarantee was then executed. DW1 himself had actually signed the guarantee.

[13] When the first defendant discovered the defects on the road DW1 said
G that he instructed DW4 to discuss with the plaintiff to resolve the matter. DW1 confirmed that the cheque was cancelled because of suspicion that the materials supplied were of inferior quality. The first defendant had however indicated their willingness to pay if the test on the crusher run met with JKR specifications.

H **[14]** According to DW1 when the plaintiff stopped supplying the first defendant had no other alternative but to source supplies from other approved sources. The alternative supplies of crusher run was supplied by AMES Marketing Sdn Bhd, the premix as well as the tack coat was sourced from Road
I Premix Sdn Bhd at a cost of RM551,085.66.

DW2

[15] Abd Holed bin Ishak is the Branch Manager and Director of Geolab

(Seremban) Sdn Bhd ('Geolab'). Geolab was appointed as an independent laboratory for the road project and had conducted a sieve analysis test report on a sample collected from the plaintiff's quarry. The report is on pp 2–5 D. The sample tested was sent by the defendants to Geolab. However that sample did not meet with JKR's specification and a second sample was tested from the same source. The sieve analysis test was conducted and the second sample met with the specifications. According to DW2 the samples tested were taken from the damaged location.

DW3

[16] DW3, Ir Hj Amiruddin Abdul Halim, is the Resident Engineer with Perunding Setia SAR, the consultant responsible for the design and supervision of the road project. They were appointed by JKR Negeri Sembilan. In his evidence he said that the consultant had rejected a load of crusher delivered to the site. It was rejected because the color of the crusher run was found to be clayish and it is suspected that there were earth contents. The plaintiff was aware of the result of the test and the rejection by the consultants and had promised to improve the quality to meet with the specifications.

DW4

[17] Kamal Baharin is the *pengurus projek menaiktaraf* Jalan Bahau-Jelai-Dangi, Negeri Sembilan and managed the project on behalf of the first defendant. In his witness statement he said:

> Terdapat aduan daripada pengguna jalan yang mengadu kepada Biro Pengaduan awam bahawa jalan yang baru diturap telah rosak dan membahayakan pengguna jalanraya satu masaalah yang dinyatakan adalah bahawa permukaan lapisan jalan yang baru diturap (binder) rosak teruk dimana menyebabkan keadaan permukaan jalan berlubang-lubang, Consultant, Perunding Setia SARjuga mengarahkan pihak Defendan untuk membaiki kerosakan dan mengambil sample crusher run yang berkenaan untuk diuji.

[18] This witness however was unable to answer most of the questions during cross-examination in particular with regards to counterclaim. The documents which he himself prepared DW4 was unable to justify or to explain.

DW5

[19] DW5 is the CEO of IKRAM QA Services Sdn Bhd. DW5 confirmed the test was conducted by IKRAM is reliable but he was not the person who carried out the test. DW5 did not want to be regarded as an expert witness.

ISSUES

Whether the crusher runs, premix and tack coat supplied by the plaintiff were defective

[20] Based on the oral and documentary evidence prior to the first defendant's agreement to purchase the crusher runs two tests were conducted. The first test conducted on the samples provided failed to meet the specifications. However a second test was duly conducted and then samples tested successfully met with the specifications of JKR. This is confirmed through the evidence of PW1, DW1, DW2, DW3 and DW4. The materials were then supplied and delivered to the project site.

When was it discovered that the crusher run supplied was defective?

[21] DW3 who was the consultant for the road project gave evidence that there were a lot of potholes on the road after the upgrading was done. DW4 also gave evidence that they had received complaints from road users through BPA of the condition of the road. This would mean that defects, if any, were discovered after the upgrading works were completed by the first defendant. By a letter dated 14 June 2010 signed by DW4 the first defendant informed the plaintiff of the defect on the road and that a sieve analysis was conducted on a sample. The result of the test conducted found that the sample did not meet to specifications as set by JKR:

> … pihak kami telah menjalankan ujian 'Sieve Analysis' pada sampel yang diambil di tapak atas arahan pihak Perunding. Didapati 'Cumulative Passing Percentage' bagi ayakan saiz 37.50mm dan 20mm tidak melepasi nilai spesifikasi JKR ….

[22] Section 41 of the Sale of Goods Act 1957 ('SGA') a buyer has a right to examine the goods delivered to him:

> Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

[23] Section 42 of the SGA further provides that:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after a lapse of time, he retains the goods without intimating to the seller that he had rejected them.

[24] In *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd & Ors* [2000] MLJU 106; [2000] 3 CLJ 375 the High Court held that when there are acceptance of the delivered goods the defendant had lost its right to reject the goods. His Lordship Justice Abdul Malik Ishak in the case of *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425 at p 438; [2010] 4 CLJ 203 at p 217 referred to the case of *Leaf v International Galleries* [1950] 1 All ER 693 (CA) where Denning LJ at p 695 had this to say:

> In this case the buyer must clearly be deemed to have accepted the picture. He had ample opportunity to examine it in the first few days after he bought it. Then was the time to see if the condition or representation was fulfilled, yet he has kept it all this time and five years have elapsed without any notice of rejection. In my judgment, he cannot now claim to rescind, and the appeal should be dismissed.

[25] On the facts, it would be apparent that the plaintiff had the opportunity to inspect the crusher runs and this was duly done when the two tests were conducted before the crusher runs were supplied, delivered and subsequently used. It was only after the complaints were received from road users that the consultants checked the quality of the crusher runs at the affected area. The area of the affected road is 1308.95m2.

[26] Based on the evidence the first defendant had examined the crusher run and it was only after the result of the second test conducted and found to in compliance with JKR specifications that the crusher runs were supplied and ultimately used by the first defendant in the road project. Applying ss 41–42 of the SGA and the cases as mentioned above the first defendant is deemed to have accepted the crusher runs and all other materials supplied when they were delivered to the project site and duly accepted by the first defendant.

EXPERT EVIDENCE

[27] The plaintiff relied on the expert evidence of PW2. PW2 is the technical manager of Testech Sdn Bhd an accredited testing laboratory. Testech Sdn Bhd was accredited by Skim Akreditasi Makmal Malaysia.

[28] PW2 possess a Diploma in Civil Engineering and have completed courses in various universities in the field of testing building materials. He has been in this field since 1982 and has given evidence in several court cases as an expert witness.

[29] In his witness statement he explained that the samples of the crusher run for testing was delivered by the plaintiff. Tests were conducted to determine the density and moisture contents. The purpose of the test is to establish the maximum dry density and optimum moisture content of the sample. The test

is required before a further test known as California Bearing Ratio ('CBR') test is conducted. The CBR is a test for the evaluation of the mechanical strength of the crusher run. The JKR's specification for CBR for crusher run is more than 80% and after the tested were conducted the CBR value of the samples is 124.54%.

[30] PW2 is of the opinion that the samples of crusher run to be tested should not be taken from the affected area. He explained that once the crusher run is laid it is compacted before premix is placed over it. The compaction and the exposure to water would cause the crusher to be finer and mixed with earth. The samples that were tested by Testech were form the quarry and not form the affected area.

[31] DW5, is the *ketua eksekutif* of IKRAM QA Services Sdn Bhd ('IKRAM') was called to confirm the authenticity of IKRAM report. DW5 possessed a Degree on Civil Engineering and Master of Science Majoring in Structures. He does not considered himself as an expert witness and the last time he gave evidence was about 20 years ago. DW5 confirmed that the IKRAM report is based on the samples sent by the first defendant and is reliable. When he was cross-examined he explained that it is not the role of IKRAM to compare with JKR specifications. When IKRAM conducted the test it does not look at JKR specifications:

> … when we do the test we never look at this document … because of impartiality … in my testing I must make sure they are not suppose to know …

[32] The other expert evidence the defendants relied on is the evidence of DW2.

[33] This court is now faced with the task of having to weigh the expert evidence from both sides but in the final analysis only one will be relied upon. Adams J in *Sim Ah Oh v Public Prosecutor* [1962] 1 MLJ 42; [1961] 1 LNS 124 at p 43 (MLJ) held:

> The evidence of the expert must be tested like any other evidence against the facts upon he is disposing. The expert should have been asked by the prosecutor to elaborate and give his reasons as to why he said these odd pieces of paper were in fact documents relating to public lottery, and the learned President should have considered these reasons before he came to his finding.

[34] Brown Ag CJ in *Sim Ah Song & Anor v Rex* [1951] 1 MLJ 150; [1951] 1 LNS 83 at p 151 (MLJ) said:

> The responsibility for the determination of this question, as in the case of every question upon which expert evidence is called, rested upon the court and not upon the expert. The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the court lacks, the court is in no better position than it was before to determine the question which it is its duty to determine, and if the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court.

[35] Gopal Sri Ram JCA in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 116; [2003] 2 CLJ 19 at p 25 said:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

[36] From the evidence all the experts have explained the tests which they have conducted. The tests results are different because the samples tested were retrieved from different sources. The samples tested by the plaintiff were from the quarry. The samples tested by the defendants were from the affected stretch of road.

[37] It can be concluded based on the test results that samples taken from the quarry shows compliance to JKR specifications. Whereas the samples taken from the affected show otherwise. The reason as explained by DW2 is because once the crusher run is laid it is compacted before premix is placed over it. The compaction and the exposure to water would cause the crusher to be finer and mixed with earth.

[38] Guided by the evidence given by the experts I am of the considered view that the crusher runs supplied and delivered by the plaintiff were not defective at the time of delivery.

A THE CONTINUING GUARANTEE

[39] The Court of Appeal in *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1; [2011] 1 LNS 232 held:

B

> …, when there is an offer and an acceptance of that offer, an agreement is in existence and the court will enforce it. In simple contract the agreement must be supported by consideration to establish the obligation. The parties too must intend the agreement to have legal force because the courts will only enforce what the parties intend should be enforced. The parties must also agree that their agreement must be mutual. And the parties must also be legally capable of reaching a binding agreement and, finally, the subject matter of their agreement must be legal.
>
> In deciding whether the parties have reached an agreement, the law looks for an offer by one party and an acceptance to the terms and conditions of that offer by the other. There would be a bargaining process leading up ultimately to an agreement or meeting of the minds. This is the traditional method of analysis of an offer and an acceptance which has been applied by the courts in determining the formation of the contracts. But for a contract to be formalised, all the terms and conditions must be fulfilled. The failure to fulfill a term or a condition would not give rise to a concluded contract.

C

D

E

[40] Gopal Sri Ram JCA (as he then was) in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 at p 335; [1997] 1 CLJ 625 at p 631 said:

F

> … a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loop-hole and commerce would come to a virtual standstill.

G

> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER (Rep) 494, where he said:
>
> > Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear …

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[41] The second defendant had signed the guarantee on behalf of the first defendant accepting the terms and conditions therein. Therefore in the absence of fraud the defendants are bound by the terms of the said guarantee.

THE COUNTERCLAIM

[42] The defendants in its counterclaim claimed for the cost of buying the crusher runs from different supplier and the cost and expenses incurred to repair the affected road. DW1 during cross-examination could not verify the total amount of crusher runs bought after the purported defects were discovered:

> Q: You have a Counterclaim your claim for the crusher runs you had obtained for another source
>
> A: from the record approx 829 7 tonnes … the total
>
> Q: … the total amount from other suppliers?
>
> A: I am not sure of the quantity.

[43] DW1 was referred to a document prepared by the first defendant on p 9D:

> Q: Are you maintaining 225 drums of tack coat was obtained for the area of 8225?
>
> A: There may be an error … we are not maintaining the figure.

[44] DW1 during cross-examination could not even confirmed the voucher when he was shown:

> Q: Re; pg 43 You cannot confirm whether it was to purchase to replace the defective crusher runs
>
> A: Yes I cannot confirm.

[45] The defendants have failed to establish that the crusher runs supplied by the by the plaintiff are defective. Therefore the defendants cannot succeed in its claim for the cost of purchasing the crusher runs from other suppliers. Furthermore the defendants could not even verify the invoices for the supply of crusher runs from other suppliers.

CONCLUSION

[46] After careful consideration of the evidence and written submissions as well as the authorities put forth by both learned counsel and based on the

reasons above I find that the plaintiff has established its case against the defendants on a balance of probabilities. Therefore the plaintiff's claim against the defendants is allowed with cost.

[47] I further find that the defendants have failed to prove the counterclaim on a balance of probabilities and hereby dismissed the counterclaim with cost.

Plaintiff's claim allowed with costs and defendants' counterclaim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed